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Office of Administrative Law Judges
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Issue Date: 01 February 2006

CASE NO. 2003-LHC-00275

OWCP NO. 14-130634

In the Matter of:

KENNETH GJERDE,
Claimant,

vs.

TODD PACIFIC SHIPYARD CORP. and
CAMBRIDGE INTEGRATED SERVICES GROUP,
Employer and Carrier.

Appearances:

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For the Claimant

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For the Employer and Carrier

Before: Alexander Karst
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

Claimant Kenneth Gjerde seeks benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq*. ("the Act"), for an injury to his low back which was sustained in the course and scope of his maritime employment with Todd Pacific Shipyard ("Employer"). He seeks compensation for total disability from the date of his injury on June 10, 1999 until April 9, 2003, when he secured alternative employment, and partial disability from April 10, 2003 and continuing into the future.

The essential facts of this case are not in dispute. The parties agree that Claimant sustained a low back injury which precludes him from returning to his pre-injury employment in Employer's shipyard, although he is capable of performing alternative work. It is further agreed that prior to sustaining this low back injury, Claimant was diagnosed with a permanent medical condition known as hyperreflexia. The primary issue in dispute is the extent of Claimant's post-injury wage-earning capacity. Claimant contends that, as a result of the combination of his work-related back injury and pre-existing hyperreflexia, he is unable to work full-time. He contends that the actual earnings from his part-time job fairly represent his post-injury wage-earning capacity, and that these earnings should therefore be used in calculating the amount of his partial disability award. Employer denies that Claimant is limited to part-time employment, and contends that Claimant is physically capable of working in alternative full-time jobs which it has identified. Employer also seeks Special Fund relief under section 8(f) of the Act.

BACKGROUND

Claimant was born in Norway on November 23, 1950. He obtained a high school education and served in the Norwegian military. From 1967 until 1977, he worked as a musician in Europe. From 1977 until 1990, Claimant worked for Royal Caribbean Cruise Lines providing on-ship musical entertainment and as a quartermaster. He settled in Seattle, Washington in 1989, where he worked as a commercial and residential painter until 1993. In 1993, he began work as a painter in Employer's shipyard. He does not have a driver's license. Tr. at 70.

Prior to sustaining the injury which is the subject of the present claim, Claimant reported injuries to his back on at least four occasions. First, he was lifting a large box in December 1996 when he felt sharp pain in his lower back. He was diagnosed with "low back strain with extreme discomfort." EX 17 at 152. Secondly, in June 1997, his low back pain recurred and he was diagnosed with lumbosacral sprain. EX 17 at 154. Thirdly, in September 1997, Claimant re-injured his low back and was treated by Dr. John Lazzareti, who diagnosed "recurrent low back pain with significant muscle spasm." EX 17 at 156. Dr. Lazzareti reported that Claimant's lower extremity deep tendon reflexes were unusually responsive and recommended a consultation with Dr. Aleksandra Zietak. Dr. Zietak saw Claimant on October 20, 1997 and interpreted an MRI of his spine as revealing a disk bulge at L2-3, and mild scoliosis. EX 17 at 157. On physical examination, Dr. Zietak noted hyperactive deep tendon reflexes and clonus at the ankles.[1] She observed that Claimant's gait is "mildly spastic." Dr. Zietak referred Claimant to neurologist Dr. James B. MacLean, who saw Claimant on October 23, 1997. Dr. MacLean reported that Claimant has hyperreflexia "of unknown etiology." EX 17 at 161. In January 1998, Claimant injured his back for the fourth time. He saw Dr. Zietak, who reported that Claimant has an underlying neurologic disorder causing hyperreflexia, and opined that it would be "difficult for him to return to work at this time because whatever the underlying neurologic problem is, the spasticity is going to aggravate the back pain." EX 17 at 165.

The injury which is the subject of the present claim occurred on or about June 10, 1999. Claimant testified that he injured his low back while lifting a large needle gun in a confined space. According to Claimant, his left leg began to shake and he felt pain "shooting through my whole back and spine area." Tr. at 71. He sought treatment on the same day at the Urgent Care

[1] Clonus is repetitive, rhythmic contractions of a muscle when attempting to hold it in a stretched state.

Clinic at Harborview Medical Center ("Harborview") in Seattle, complaining of low back pain and numbness in his left buttock and radiating down his left leg. CX 1 at 12. The assessment was "sciatica of left leg related to lower muscular strain and muscular spasm." CX 1 at 12-13. On June 15, 1999, Dr. Michelotti of Harborview's Orthopedic Spine Clinic diagnosed Claimant with "acute exacerbation of lumbago." CX 1 at 17-18. Claimant returned to work on or about July 14, 1999, but suffered an exacerbation of his back injury shortly thereafter. He last worked for Employer on or about July 21, 1999. EX 7 at 73.

On September 28, 1999, Claimant was evaluated at Employer's request by Dr. William Boettcher, orthopedic surgeon, and Dr. Phillip Grisham, neurologist. EX 4. Drs. Boettcher and Grisham diagnosed: (1) degenerative low back disease with slight herniation at the L2-3 level, predating Claimant's work injury of June 10, 1999; (2) probable spinal cerebellar degenerative process, not related to the June 10, 1999 work-related incident; and (3) L3-4 disc herniation, on a more probable than not basis causally related to the June 10, 1999 work-related incident. EX 4 at 10. They opined that Claimant has "central nervous system problems" resulting in hyperreflexia which are not causally related to work activity, and that the underlying central nervous system problem is probably contributing to the effects of the L3-4 disc herniation. EX 4 at 10-11. Drs. Boettcher and Grisham concluded that Claimant had reached maximum medical improvement with regard to the L3-4 disc herniation and they had no recommendations for further treatment relating to "the sole and direct effects of his injury of 6-10-99." EX 4 at 11.

In October 1999, Claimant was seen by Dr. Sohail Mirza at the Orthopedic Spine Clinic. He complained of low back pain which radiated from left hip to left foot, as well as left leg numbness and weakness which caused him to trip. CX 1 at 28. Dr. Mirza interpreted an August 1999 MRI of Claimant's lumbar spine as showing an L3-4 herniated disc. CX 1 at 25, 28, 31. Electrodiagnostic studies from September 1999 were interpreted as "consistent with both motor and sensory radiculopathy affecting multiple lumbosacral nerve roots." CX 1 at 25. At this time, Claimant was being evaluated for possible surgery to relieve his back pain. CX 1 at 29, 31. On October 31, 1999, Dr. Mirza wrote a letter to Dr. Thomas Gunby in which he opined that, "because of his pain and radiculopathy, it is reasonable at this time to perform an L3-4 microdiskectomy." He asked Dr. Gunby to perform a preoperative evaluation. CX 1 at 33.

Dr. Mirza also referred Claimant to Dr. David Tirschwell at Harborview's Neurology Clinic, in order to fully evaluate Claimant's neurologic status prior to surgery. Dr. Tirschwell examined Claimant on February 14, 2000 and reported increased muscle tone in both legs, abnormal deep tendon reflexes, and clonus at the patella and ankles. CX 1 at 40-41. He opined that the physical findings of hyperreflexia suggest an upper motor neuron process and therefore recommended MRI's of the cervical and thoracic spinal regions. CX 1 at 40.

On February 22, 2000, Dr. Mirza reported that Dr. Gunby had cleared Claimant for spinal surgery. Noting Dr. Tirschwell's recommendation for further imaging studies of Claimant's spine, however, Dr. Mirza deferred scheduling surgery pending the results of the MRI's. CX 1 at 46. Dr. Tirschwell saw Claimant again on March 27, 2000. MRI's of Claimant's entire spine, including the cervical, thoracic, and lumbar segments, were interpreted as showing no clear explanation for his physical examination. Dr. Tirschwell recommended an MRI of the brain and cleared Claimant for spinal surgery. CX 1 at 49.

On April 1, 2000, Claimant was seen by Dr. Mirza. His report indicates that he was planning to schedule Claimant for surgery and that risks of surgery had been discussed. CX 1 at 60. However, on April 14, 2000, Dr. Mirza wrote to Dr. Tirschwell, reporting that Claimant has "minimal" stenosis at the L2-3 level which is not concordant with his symptoms, and that he advised against surgery for the lumbar spine. CX 1 at 65.

On October 19, 2000, Claimant was evaluated at Employer's request by Dr. Thomas Williamson-Kirkland, a board-certified physician specializing in physical medicine and rehabilitation. EX 23 at 289. Dr. Williamson-Kirkland diagnosed: (1) two-level degenerative disc disease, L2-3 and L3-4, "now mostly nonsymptomatic;" and (2) spastic hyperreflexia, left lower extremity more prominently. EX 6 at 21. He reviewed Claimant's medical records and concluded that he has an upper motor neuron disease, "probably secondary to something going on in his brain, and may be hereditary in nature . . . All of us have agreed that this is not a work-related injury and not secondary to his discs." EX 6 at 21. The only treatment recommended was stretching exercises for the back and legs. Due to the need for stretching, Dr. Williamson-Kirkland opined that Claimant had not reached maximum medical improvement. EX 6 at 22.

On November 6, 2000, Claimant returned to Urgent Care complaining of low back pain. He saw Dr. Mirza on November 17, and told him that the shaking in his left leg had improved since he began taking Neurontin in August 2000. Dr. Mirza reported that the results of an MRI of the brain, performed on September 21, 2000, had been interpreted as essentially normal. CX 1 at 84. He recommended a follow-up with Dr. Tirschwell in neurology. Dr. Tirschwell saw Claimant on November 27, 2000, and reported an inability to define the cause of Claimant's hyperreflexia or to "clearly make a diagnosis at this point other than the clear lumbar spinal stenosis with intermittent low back pain." He recommended further electrodiagnostic studies to rule out motor neuron disease. CX 1 at 90. In February 2001, these studies were interpreted by Dr. Tirschwell as showing no clear cause for the hyperreflexia. He declined to pursue further diagnostic evaluations and suggested treatment only for Claimant's chronic pain. CX 1 at 99.

In January 2001, Claimant was referred to Paul Perkins, a vocational rehabilitation counselor at the University of Washington, Department of Rehabilitation Medicine.[2] Mr. Perkins' task was to determine what Claimant is reasonably capable of doing on a consistent basis. Tr. at 40, 46. He enrolled Claimant in a program that would allow him to do volunteer work in a select site called a "job station," in order to determine his vocational abilities. Tr. at 40. Beginning in March 2001, Claimant served as a "storeroom attendant" in the Central Services department at Harborview. He walked throughout the hospital with a cart delivering lightweight supplies to nursing stations. Tr. at 41.

Mr. Perkins testified about his assessment of Claimant's physical limitations. He said that Claimant cannot perform all of the duties of a regular position because he is unable to sit or stand for long periods or lift objects of any weight from the floor. Tr. at 43. He noted that Claimant walks slowly and he believes Claimant needs clear instructions to perform most jobs. Tr. at 48, 53. He opined that Claimant is capable of part-time work, "at his best." Tr. at 51. He

[2] Mr. Perkins obtained a Bachelor's degree in 1967 from University of Pittsburg and a Master's degree in rehabilitation counseling from University of Oregon in 1972. He has been employed at the Department of Rehabilitation Medicine at Harborview since 1973.

testified that Claimant established through the job station that he was capable of performing his duties up to four hours a day, five days a week. This schedule was arrived at by starting at three hours a day, three days a week, then gradually increasing hours and/or days. At one point, Claimant worked six hours a day. However, Mr. Perkins testified that he was unable to consistently sustain that activity because it exacerbated his back pain. Tr. at 42. Mr. Perkins testified that within the activities Claimant was capable of doing, he was "extremely dependable and conscientious." Tr. at 43. Claimant maintained his position until September 2001, when the job-station program was discontinued. Mr. Perkins testified that thereafter, Claimant returned to his volunteer position on his own because, according to Claimant, "it was a purposeful and satisfying role for him to have something to get up and to do everyday." Tr. at 44.

During 2001, Claimant's symptoms remained relatively stable. On May 17, Claimant's primary care physician, Dr. Daniel Lessler, opined that his "exam is essentially unchanged" as to both the low back and the hyperreflexia. CX 1 at 104. On July 26, Dr. Lessler felt that "clinically, the patient is stable to somewhat improved." CX 1 at 107. On November 29, Dr. Lessler reported Claimant's status as "unchanged, somewhat worse." CX 1 at 123.

Claimant was again evaluated at Employer's request on October 25, 2001, by orthopedic surgeon Dr. Charles Brooks. Dr. Brooks reported the following pertinent diagnoses: (1) degenerative disc disease, cervical, thoracic, and lumbar spine; (2) disc bulges L2-3 (mild), L3-4 (moderate), and L4-5 (moderate) due to degenerative disc disease; (3) possible large left posterolateral disc protrusion L3-4 due to degenerative disc disease and possibly the preceding work injuries; (4) central spinal stenosis lumbar spine; (5) possible severe left lateral recess stenosis L3-4, due to the disc protrusion (if present); (6) spasticity with accompanying hyperreflexia; and (8) chronic left low back pain, probably due to disc lesions (if present) and spinal stenosis. EX 7 at 78. Dr. Brooks qualified his diagnoses regarding the disc protrusions at L2-3 and L3-4 due to a perceived inconsistency of findings on imaging studies. EX 7 at 83.

During a visit to the Occupational and Environmental Medicine Clinic in December 2001, Claimant reported that he was experiencing "short-term memory deficit." He was referred to neurologist Dr. Jordan Firestone on March 13, 2002. Dr. Firestone is a board-certified neurologist with a fellowship in occupational and environmental medicine. CX 35. He testified that he became aware of Claimant's case in late 2000, began treating Claimant in April 2002, and had seen Claimant eight times as of November 6, 2003. CX 38 at 6-7. He has reviewed Claimant's medical records and consulted with other treating physicians. On May 20, 2002, Dr. Firestone's assessment was: (1) lumbar spondylosis with degenerative changes and syndrome of low back pain with intermittent sciatica, with concern for progressive nerve root compression with subjective weakness on the left leg; and (2) hyperreflexia of uncertain etiology. CX 1 at 178. In April 2003, Dr. Firestone prescribed Balcofen, an anti-spasmodic agent. On July 14, Claimant reported decreased shaking and a more relaxed feeling in his legs. CX 1 at 242.

On September 28, 2004, Claimant underwent a fourth medical examination at Employer's request. Claimant was evaluated by Dr. Raymond Valpey, neurologist, and Dr. Boettcher, the orthopedic surgeon who had previously seen Claimant along with Dr. Grisham in September 1999. EX 16. Dr. Boettcher prepared a report which listed the pertinent diagnoses as: (1) lumbar disc herniation L3-4, probably related to the June 1999 work injury; (2) pre-

existing multi-level lumbar disc degeneration; and (3) spastic paraparesis of unknown cause, probably unrelated to the June 1999 work injury. EX 16 at 138.

DISCUSSION

The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable statutory provisions, regulations, and precedent. The parties agree that: (1) on or about June 10, 1999, Claimant sustained an injury to his low back that arose out of and in the course of his employment; (2) Claimant's injury occurred at a maritime situs while he was engaged in a maritime activity; (3) the claim for benefits was timely; (4) Claimant's average weekly wage at the time of injury was $959.71; (5) Claimant's injury permanently precludes him from returning to his pre-injury employment; and (6) Claimant received temporary total disability compensation between June 16, 1999 and July 13, 1999, and between July 21, 1999 and June 1, 2001; permanent total disability between June 2, 2001 and April 10, 2002; and permanent partial disability from April 11, 2002 to the present.

The following issues are in dispute: (1) whether Claimant's hyperreflexia combined with his work-related low back injury to create a compensable overall disability; (2) the date of maximum medical improvement for Claimant's compensable injuries; (3) Claimant's retained earning capacity; (4) whether Employer is entitled to section 8(f) relief; and (5) whether Claimant will be granted leave to withdraw his claim for medical benefits.

1. Compensable Injury

To establish a claim for disability benefits under the Act, a claimant must establish the existence of a "disability," defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. §902(10). "Injury" is defined in part as an "accidental injury or death arising out of and in the course of employment." 33 U.S.C. §902(2). Employer concedes that Claimant sustained an injury to his low back on or about June 10, 1999 and that the injury arose in the course and scope of his employment. *See* Employer's Post-Trial Brief, at 1. Claimant's treating physician, Dr. Firestone, and Employer's physicians, Drs. Boettcher and Grisham, agree that Claimant suffered a L3-4 disc herniation, which is "on a more probable than not basis" causally related to an incident at work on June 10, 1999. Tr. at 95. Accordingly, I find that Claimant sustained a back injury which is compensable under the Act. *See* 33 U.S.C. §902(2).

Claimant next asserts that his work-related back injury combines with his pre-existing hyperreflexia to result in his overall disability therefore the so-called aggravation rule applies to his case. Under the aggravation rule, when an "employment injury aggravates, accelerates, or combines with a preexisting impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable." *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1991). Employer argues that Claimant's hyperreflexia is not related to his employment or his low back injury, but rather is a separate and distinct condition for which Employer is not required to compensate him. The issue is thus whether Employer is liable for the disability arising from both of these conditions.

Whether Claimant's back injury combines with his hyperreflexia depends initially on a finding of whether the hyperreflexia pre-existed the back injury. *LaPlante v. General Dynamics Corporation*, 15 BRBS 83 (1982) at 2. There is no serious dispute that it did. The medical records show that Claimant exhibited hyperreflexic findings as early as 1997. EX 17 at 161, 165. Accordingly, I find that Claimant's hyperreflexia pre-existed his back injury of June 1999.

Claimant contends that the testimony of Dr. Firestone supports his theory that his two medical conditions combine to create a greater disability than either would alone. Dr. Firestone explained that hyperreflexia manifests itself by increased muscle tone and gait abnormalities. He opined that Claimant's hyperreflexia and his back injury "work in concert, that with his increased muscle tone and awkward gait, that he is more likely . . . to suffer from exacerbations than he would be if he did not have that increased muscle tone." CX 38 at 41. He gave three examples to support this conclusion. First, increased tone causes the legs to "not act as good shock absorbers . . . and that could extend into the muscles around the spine itself. So that in ambulating, they are less likely to give with the shock of foot fall or an abrupt step. [Therefore] the impact from those steps would be transmitted to the spinal column more forcefully with increased muscle tone than without." CX 38 at 43. Secondly, Dr. Firestone opined that abnormal muscle tone affects recovery from back injury or periodic exacerbations because, in order for recovery to occur, "the muscles have to relax to allow things to remodel, to allow the pain that's being generated to abate. If the muscles are . . . more active, then that process will not proceed as easily." Tr. at 103. Thirdly, he explained that increased tone makes it difficult for Claimant to crouch, which is a necessary part of lifting with good posture. Tr. at 105.

Claimant also contends that his position is supported by the testimony of Dr. Valpey, who evaluated him for Employer in September 2004, along with Dr. Boettcher. Dr. Valpey testified that hyperreflexia is only one sign of a condition in the upper spinal cord or brain so that a low back injury would not aggravate the underlying problem causing the hyperreflexia. EX 24 at 376. Dr. Valpey acknowledged the possibility that the hyperreflexia combines with Claimant's low back injury to create a greater disability. EX 24 at 376. He further testified that "it's being kind of speculative," but it is possible that "if it weren't for the spasticity, that [Claimant] might not have quite the degree of flares that he would otherwise." EX 24 at 376. Dr. Boettcher opined that "a generalized neurological problem, such as [Claimant] has, can compound the adverse effects of a pinched nerve . . . caused by a lumbar disc protrusion." EX 25 at 403.

Employer contends that the testimony of Dr. Williamson-Kirkland supports a finding that Claimant's hyperreflexia and his back injury are unrelated conditions with no combined effect. Dr. Williamson-Kirkland testified that he disagrees with the clinicians who believe that the two conditions combine to make Claimant more disabled than he would be by either condition alone. EX 23 at 316. He explained that Claimant has limitations arising out of the back injury which include restrictions on lifting and bending, but that the "paraparesis or quadriparesis is going to limit him more than that." EX 23 at 317. He opined that persons with spastic paraparesis are less likely to injure their backs because they "are careful. They walk slower. They move slower. They don't bend a lot because they're liable to fall over. They don't do things that are liable to injure themselves and stress the back." EX 23 at 317. When asked whether tripping caused by spasticity might exacerbate a back injury, Dr. Williamson-Kirkland responded: "If you fall there is always a chance that could injure your back more. Most of these people, however, fall

because of extension problems as much as anything else, tend to fall backwards, but a fall is a whole different issue. And I don't see him—maybe he falls a lot, but I didn't get that from him when I saw him." EX 23 at 322. Dr. Williamson-Kirkland also denied that a jarring gait caused by spasticity is liable to cause back injury because "with more jarring, the more slow they go; the more unlikely they are to hurt their back." EX 23 at 322.

In the Ninth Circuit, where this injury occurred, the opinion of a treating physician is accorded "special weight." *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998). Dr. Firestone testified that Claimant's hyperreflexia combined with his work-related back injury to result in his ultimate impaired condition. I credit Dr. Firestone's opinion because it is supported by plausible examples of the ways in which the hyperreflexia makes Claimant more likely to exacerbate his back pain. His opinion is corroborated to some extent by Drs. Valpey and Boettcher, who noted the possibility that Claimant is more likely to suffer "flares" than is someone without spasticity. Moreover, I am not persuaded by the contrary opinion of Dr. Williamson-Kirkland, who was alone among the testifying physicians in denying the possibility of a combined effect between the two conditions. Dr. Williamson-Kirkland's theory that Claimant's hyperreflexia reduces his risk of exacerbating his back injury is without a basis in objective medical findings. For this reason, Dr. Firestone rejected this theory as "speculative."

Claimant has two medical conditions, a conceded work-related low back injury and an unexplained neurologic condition which is not shown to be work-related. The law is clear, however, that an employment injury need not be the sole cause or even a primary factor in a disability to enable a claimant to receive compensation. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814 (9th Cir. 1966). It is sufficient to justify an award if the work injury is a concurring cause of the disability for which compensation is sought. *Id.* at 814-815. Moreover, the relative contributions of the work-related injury and the prior disease are not to be weighed. *Moore v. Paycor, Inc.*, 11 BRBS 483 (1979). The physicians who examined Claimant agree that the back injury subjects Claimant to the risk of painful exacerbations, restrictions on twisting, bending and lifting, and discomfort with sitting or standing for prolonged periods. They also agree that due to his hyperreflexia, Claimant has a "spastic gait" which sometimes causes him to trip, he moves slowly, cannot bend or crouch easily, and has poor balance and coordination. The weight of the medical evidence thus establishes that both conditions are symptomatic and both limit Claimant's physical activities in various ways, some of which are overlapping. It is evident that the symptoms which accompany each condition are more disabling when aggregated than would be the symptoms of either condition alone. The fact that part of Claimant's disability is due to a non-employment condition does not require him to prove that his disabilities combined in more than an additive way to warrant compensation for the resulting overall impairment. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 836 (9th Cir. 1991). *See also Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 815 (9th Cir. 1966) (citing *Schreven v. Industrial Comm.*, 393 P.2d 150, 152 (1964) (claimant with congenital back deformity awarded full compensation even though employment injury did not worsen congenital abnormality).

In view of the medical evidence and according "special weight" to the opinion of Claimant's treating physician, I find that Claimant's work-related back injury combines with his pre-existing hyperreflexia to produce his ultimate impaired condition.

2. Date of Maximum Medical Improvement

The nature of an injury is distinguished according to its duration—permanent or temporary. *See* 33 U.S.C. §908. An injury becomes permanent when the claimant reaches maximum medical improvement. *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233, 235 (1988). Employer contends that, based on the joint report of Drs. Boettcher and Grisham, Claimant's back condition reached maximum medical improvement on September 28, 1999. Drs. Boettcher and Grisham opined that from a neuromuscular point of view, the L3-4 disc herniation had reached maximum medical improvement. They had no recommendation for further treatment relating to "the sole and direct effects of his injury of 6-10-99." EX 4 at 11.

In contrast, Claimant asserts that, based on the opinion of Dr. Firestone, he reached maximum medical improvement on September 14, 2001. CX 38 at 51. This date originated as the opinion of Claimant's then-treating neurologist Dr. Tirschwell, which was apparently contained in a letter to Claimant's insurance carrier. Although the record contains references to this document, the actual letter does not appear in the record. Dr. Firestone testified that he considers Dr. Tirschwell's opinion to be reasonable based on his review of Claimant's medical records, which indicated to him that Claimant was "functioning well in his volunteer position here four hours per day and that his treating providers at that time described a low level of pain with infrequent exacerbations." CX 38 at 51.

Whether an injured worker has achieved maximum medical improvement is primarily a question of fact based upon the medical evidence. *Williams v. General Dynamics Corp*., 10 BRBS 915 (1979). Generally, where surgery is anticipated, maximum medical improvement has not yet been reached. *Kuhn v. Associated Press*, 16 BRBS 46 (1983). However, if anticipated surgery is not expected to improve a claimant's condition, the condition may be considered permanent. *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988).

After reviewing the relevant medical evidence, I conclude that the date of maximum medical improvement is the date determined by Dr. Firestone: September 14, 2001. There are two reasons for this conclusion. First, an L3-4 diskectomy was anticipated by Dr. Mirza and other treating physicians from October 1999 until August 2000. CX 1 at 25-65. In light of this fact, I decline to accept the joint opinion of Drs. Boettcher and Grisham, that Claimant reached maximum improvement as of September 1999 as they did not mention, and I therefore assume did not consider, the possibility of surgery. Secondly, I am persuaded that Claimant reached maximum medical improvement on September 14, 2001 because, although surgery was ultimately rejected, the conservative course of treatment that was adopted instead brought about a stabilization of Claimant's back symptoms. Surgery was rejected in April 2000 because it was felt that Claimant would be better served by localized pain management plus physical therapy. As part of the conservative treatment, Claimant began taking Neurontin in August 2000, which reportedly provided significant relief from the pain in his low back and left leg. CX 1 at 83, 106. Physical therapy beginning in late 2000 also contributed to Claimant's overall stability, as reflected in the records of his primary care physician, Dr. Lessler. CX 1 at 106, 110. I therefore find in light of the foregoing that between June 10, 1999 and September 13, 2001, Claimant was under treatment which was intended to, and did, improve his condition. Accordingly, I find that Claimant's condition became permanent on September 14, 2001.

3. Extent of Permanent Disability

The parties agree that Claimant's work-related low back injury precludes him from returning to his previous job as a painter. The remaining issue is the availability of other jobs he can perform. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980). If Employer establishes that suitable alternative employment is available to Claimant, his disability is partial, not total. Total disability becomes partial on the earliest date that alternative employment is established. *Stevens v. Director, OWCP*, 909 F.2d 1256, 1257 (9th Cir. 1990). Employer contends that alternative employment was available to Claimant as of April 2002.

To establish suitable alternative employment, an employer must show specific, realistically available jobs within the geographical area where the claimant resides, which he is capable of performing considering his verbal and technical skills, age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *Hairston v. Todd Shipyards Corp*., 849 F.2d 1194, 1196 (9th Cir. 1988). An administrative law judge may rely on the testimony of vocational counselors that specific job openings exist to establish the existence of suitable jobs. *Turney v. Bethlehem Steel Corporation*, 17 BRBS 232, 236 (1985). The judge may credit a vocational expert's opinion even if the expert did not examine the claimant, as long as the expert was aware of the claimant's age, education, industrial history, and physical limitations when exploring local job opportunities. *Southern v. Farmers Export Company*, 17 BRBS 64, 66-67 (1985). However, employment positions identified by the vocational counselor do not constitute suitable alternate employment when there is doubt as to whether the employee could perform the jobs due to his education and physical restrictions. *Uglesich v. Stevedoring Servs. of America*, 24 BRBS 180 (1991).

Employer contends that Claimant is capable of working in alternative jobs as identified in labor market surveys which were conducted in 2002 and 2004 by Kent Schafer, a certified rehabilitation counselor.[3] Mr. Schafer interviewed Claimant on January 31, 2001. On June 5, 2002, he prepared a report which indicates that as a result of conducting a labor market survey, he identified eight positions that could be performed by a person with Claimant's vocational characteristics and the physical limitations proscribed by Dr. Charles Brooks. EX 13. Dr. Brooks had opined that Claimant should not lift or carry items heavier than fifty pounds and should avoid repetitive bending and twisting of the torso. EX 7 at 88. Mr. Schafer also tried to find jobs that were accessible by public transportation, given Claimant's lack of a driver's license. The positions identified by Mr. Schafer in his April 2002 labor market survey were security inspector, elevator operator, cashier, janitor, production worker, and three security officer positions. EX 13 at 110. These were full-time positions with pay scales that ranged from $8.00 per hour to $11.60 per hour, with most falling within the $9.00 to $10.00 per hour range. Mr. Schafer conducted a second labor market survey in 2004 and identified five additional positions which Employer contends were available to Claimant. These full-time positions included two bench assembler and two assembler positions, and a deburrer position. The pay ranged from $8.00 to $10.00 per hour. EX 22.

[3] Mr. Schafer obtained a Bachelor of Sciences degree in business administration from California State Polytechnic University in 1972 and in psychology from University of Washington in 1975, a Master's degree in Counseling from University of Washington in 1979, and certification as a rehabilitation counselor in 1982. EX 19.

Claimant contends that none of the jobs identified by Mr. Schafer constitutes suitable alternative employment because the job duties for each position exceed the physical limitations proscribed by his treating physicians. Specifically, Claimant contends that Employer's jobs are inappropriate because they are full-time positions, whereas Claimant's treating physicians limit him to part-time work. Dr. Lessler, Claimant's primary care physician, opined that Claimant can perform light duty work that does not require lifting more than ten pounds and requires no bending, squatting or kneeling, and no sitting or standing in excess of thirty minutes. CX 5; CX 38 at 29-30. Dr. Firestone testified that he considers those restrictions to be reasonable, although he would restrict Claimant to lifting ten pounds routinely and fifteen or twenty pounds occasionally. CX 38 at 29. Dr. Lessler also adopted, as consistent with his clinical findings, the assessment of vocational rehabilitation counselor Paul Perkins that Claimant is unable to work more than four hours a day or to lift objects from floor level. CX 8 at 298. Dr. Firestone testified that he agreed with those limitations, including the four-hour work day. CX 38 at 31.

The four-hour work day limitation was developed by Paul Perkins based on his assessment of Claimant's vocational abilities over a period of six months at the Harborview job station. The need for it is supported by Claimant's own testimony. Claimant testified that he tried to work eight hours a day, three days a week but his back "went out" and he had to go to Urgent Care. Tr. at 74. He next attempted to work six hours a day, four days a week, with job duties that required "a lot of sitting" to tag small medical items. Because he continued to have exacerbations of back pain, his work day was reduced to four hours and his job duties were modified to allow for less sitting. Instead, he walked through the hospital with a cart delivering light supplies to nursing stations. Tr. at 75. With this combination of hours and duties, Claimant explained that his left leg was "still shaking, but I was okay." Tr. at 75. It was thus determined that by working four hours a day, Claimant could work on a consistent basis while minimizing the risk of back pain exacerbations. The four-hour work day restriction was adopted by Dr. Lessler, and later by Dr. Firestone, for precisely this reason. CX 8; CX 38 at 32. In light of the substantial vocational evidence, which is also supported by medical opinion, that Claimant is unable to consistently sustain more than a four-hour workday, I find that Claimant is limited to part-time work.

Employer contends that it is Claimant's hyperreflexia, rather than his low back injury, which limits him to part-time work. Employer argues that, because the hyperreflexia is not work-related, any physical limitations arising therefrom should not be considered in the evaluation of alternative employment options. Employer's contention is without merit. In evaluating the suitability of alternative employment, consideration is to be given to Claimant's verbal and technical skills, age, education, work experience, and physical restrictions. *Hairston v. Todd Shipyards Corp*., 849 F.2d 1194, 1196 (9th Cir. 1988). In making this determination, pre-existing limitations must necessarily be addressed in determining whether a job is realistically available. Accordingly, where a vocational expert testifies that specific jobs are available which are suitable given claimant's age, education, history and restrictions, it is implicit in such evidence that he considered any of claimant's preexisting conditions and found these jobs reasonably available to the claimant. *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

Mr. Schafer testified that he was unaware when he conducted his labor market surveys that Claimant's treating physicians had imposed a part-time work restriction because he was not provided with, and therefore did not review, the medical records of the treating physicians. Tr. at 148, 150. Nor was Mr. Schafer aware that Dr. Boettcher, whose report he reviewed in 2004, had also endorsed a four-hour work day limitation for Claimant.[4] Tr. at 158. Mr. Schafer admitted that the jobs he identified in both the 2002 and 2004 labor market surveys were full-time and therefore would not be appropriate for someone with a four-hour workday limitation. Tr. at 142, 158. In addition to this discrepancy, there are other indications that Mr. Schafer was not fully aware of Claimant's physical limitations when he conducted his labor market surveys. Mr. Schafer testified that he was unaware of Claimant's slow gait or that he uses a cane to help maintain his balance. Tr. at 155. He admitted that these attributes might prevent Claimant from being hired for some of the identified positions, such as the security guard positions. Tr. at 155-156. Employment positions identified by a vocational counselor do not constitute suitable alternate employment when there is doubt as to whether the employee could perform the jobs due to his physical restrictions. *Uglesich v. Stevedoring Servs. of America*, 24 BRBS 180 (1991). Accordingly, I find that the proffered positions do not constitute suitable alternative employment, particularly in light of the fact that they are all full-time positions.[5]

Although Employer failed to show that employment was available to Claimant in April 2002, it is well-established that a claimant's actual post-injury employment will meet the burden of suitable alternative employment. *Royce v. Elrich Construction Co.*, 17 BRBS 157, 159 (1985). Claimant eventually obtained a job as a chemistry lab assistant at Seattle Central Community College, which he started on April 9, 2003. His duties consist of washing glassware, lifting occasionally up to fifteen pounds, and occasional bending to put dishes away. CX 19. He works two to three hours per day, five days per week, and earns $8.50 per hour. CX 13. Because Claimant obtained alternate employment on April 9, 2003, I find that his total disability became partial on that date.

The question that remains is the extent of Claimant's post-injury wage-earning capacity. Section 8(h) of the Act provides that a claimant's wage-earning capacity shall be his actual post-injury earnings if they fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h). In making this determination, consideration is given to such factors as a claimant's physical condition, age, education, industrial history, earning power on the open market, and availability of employment which he can perform after the injury. *Abbott v. Louisiana Ins. Guaranty Ass'n.*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122 (5th Cir. 1994). Regarding physical condition, consideration is given to whether the employee must seek light work, or turns down

[4] Mr. Schafer reviewed a report wherein Dr. Boettcher opined that Claimant is able to perform "sedentary to light work on a limited basis." EX 16 at 138. In his deposition, Dr. Boettcher explained that by "a limited basis," he meant that it would be reasonable for Claimant to work four hours per day as he had at Harborview. EX 25 at 477. Dr. Boettcher testified that these restrictions are not entirely due to the residuals of the industrial injury, but also "to the unexplained neurologic loss." EX 16, p. 138. As explained herein, however, it is irrelevant that the part-time work restriction arises in part from Claimant's hyperreflexia rather than from his back condition alone.

[5] During Dr. Firestone's deposition, Employer's counsel conceded that Dr. Firestone would find all of the positions identified by Mr. Schafer to be unacceptable for a person with Claimant's physical limitations. Because I credit Dr. Firestone's opinion on the issue of Claimant's functional limitations, I find that this provides additional support for a finding that the Employer has not demonstrated alternative employment which Claimant is capable of performing.

heavy work and requires more time off. *Conde v. Interocean Stevedoring, Inc.*, 11 BRBS 850, 857 (1980). Also considered is whether the employee loses work for physicians' visits necessitated by the injury. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 590 F.2d 330, 9 BRBS 453 (4th Cir. 1978). The party contending that a claimant's actual wages are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. *Burch v. Superior Oil Co*., 15 BRBS 423, 427 (1983).

The ultimate objective of the wage-earning capacity formula is to determine the wage that would have been paid in the open market under normal employment conditions to the claimant as injured. *Long v. Director, OWCP,* 767 F.2d 1578, 17 BRBS 149 (9th Cir. 1985). Claimant maintains that his post-injury wages are representative of his wage-earning capacity in light of the facts that he lacks the ability to maintain a full-time job and his current employer has made accommodations that allow him to work within his physical limitations.

With regard to Claimant's job search, Mr. Perkins testified that he attempted to refer Claimant to three job placement organizations. Tr. at 46. He explained that his referral attempts were unsuccessful as to two of the three placement agencies because of the extent of Claimant's physical limitations and need for part-time work. In August 2002, he successfully referred Claimant to Mainstay at Seattle Community College ("Mainstay"). Tr. at 47. At Mainstay, Claimant worked with Anja Post, a vocational rehabilitation counselor.[6] Ms. Post's assignment was to "assist [Claimant] to find employment which is suitable for him." Tr. at 58. She met with Claimant regularly, followed up job leads obtained through the newspaper, the computer, and some which Claimant provided on his own. Tr. at 58. Ms. Post opined that Claimant needs a flexible schedule to accommodate his doctor appointments and his need to occasionally miss work because of back pain. Tr. at 61. She noted that Claimant moves slowly, cannot lift "very much" weight or "awkward objects," and cannot bend over. Tr. at 62. She said she looked for a job for Claimant that was part-time. Tr. at 62. Consistent with her usual practice, she informed potential employers of Claimant's limitations. She believes this made it difficult for Claimant to secure employment. Tr. at 60.

For three months, Ms. Post tried to place Claimant in a paid position at Harborview similar to his volunteer position, but a job never materialized. Tr. at 59. After five more months of searching, Ms. Post placed Claimant in his current position as a chemistry lab assistant at Seattle Central Community College. Tr. at 62. She testified that it is a "very, very modified position" in that several tasks typically done by lab assistants were taken out of the job description. Tr. at 62-63. As for the tasks that Claimant does perform, Ms. Post believes he performs them "extremely well" but "very slow," and that he is detail-oriented, safety-oriented, and conscientious. Tr. at 62. She finds Claimant to be "extremely motivated" and "extremely eager." Tr. at 65. Finally, Ms. Post testified that she was "very happy finding this job after eight months and finding an employer who was willing to modify it to the extent that was needed," and that it would be "extremely difficult" to find Claimant another job. Tr. at 63-64.

[6] Ms. Post obtained a Bachelor's degree in education from University of Texas in 1985 and a Master's degree in education and rehabilitation from University of Oregon in 1989. She has worked at Mainstay since 1991. CX 35.

I find that Claimant's extensive physical limitations—including his slow gait, restrictions on sitting, standing, lifting and bending and his part-time work restriction—would make it difficult for him to obtain employment on the open market. I further find that any such difficulty is likely to be compounded by the facts that Claimant frequently misses work due to back pain flare-ups and doctors appointments. In making these finding, I credit the testimony of both Mr. Perkins and Ms. Post regarding the difficulty each experienced over a period of several months in locating a suitable placement for Claimant. These factors thus favor the conclusion that Claimant's actual wages fairly represent his wage-earning capacity.

Also weighing in favor of this conclusion is the fact that Claimant's current employer modified the lab assistant position to accommodate Claimant's physical restrictions. The beneficence of a sympathetic employer is one of the factors which must be considered with regard to the wage-earning capacity analysis. *Deviller v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 658 (1979). Beneficence includes arranging job locations to meet the claimant's physical restrictions and hiring an extra person to help him with heavy work. *Burch v. Superior Oil Co.,* 15 BRBS 423, 427 (1983). Here, the evidence establishes that the lab assistant job is a work-study position typically performed by students, but which was offered to Claimant on a permanent basis. CX 19. Claimant works two hours per day, five days a week. At times, he is not able to perform his tasks for two complete hours due to back pain. He then requests to make up lost time and is allowed to do so. CX 19. According to Ms. Post, a person without Claimant's physical restrictions could perform his tasks in no more than one hour, and they would perform additional requirements such as dismantling and cleaning hoods in the lab, organizing and storing supplies that weigh twenty pounds or more, and working more hours. CX 19. In addition, Claimant receives assistance with cleaning classroom tables and a co-worker carries the water supply to the classroom. CX 19.

Finally, I find that Employer has not met its burden of establishing an alternative reasonable wage-earning capacity. Employer contends that its vocational expert established that Claimant is capable of earning at least $18,000 to $19,000 per year if he wanted to, but he has not diligently pursued better paying employment opportunities. As explained above, however, the alternative jobs identified by Employer are not suitable for Claimant because they exceed his physical abilities. Employer has not put forth any other evidence of better-paying, realistically available part-time jobs which Claimant could perform. I note, however, that Claimant's hourly wage of $8.50 an hour is close to the wages paid in the lower-paying jobs proffered by Employer as proposed alternative employment. EX 13; EX 22. In light of the foregoing consideration of the relevant factors and Employer's failure to carry its burden, I conclude that Claimant's actual post-injury wages fairly and accurately represent his wage-earning capacity.

When post-injury wages are used to establish wage-earning capacity, the wages earned in the post-injury job are adjusted to represent the wages which that job paid at the time of the claimant's injury. *See Richardson v. General Dynamics Corp.*, 19 BRBS 48, 49 (1986). The evidence establishes that Claimant's current position paid $5.75 per hour when he was injured in 1999. CX 32. Recent earnings statements show that he worked 241 hours over a 26-week period, or an average of 9.27 hours per week. Therefore, applying the 1999 wage of $5.75 per hour, Claimant's adjusted post-injury weekly wage is $53.30 per week.

4. Special Fund Relief

On August 14, 2000, Employer submitted an application to limit its liability for the injury to Claimant's low back pursuant to section 8(f) of the Longshore Act. EX 17. Section 8(f) shifts part of the liability for permanent disability from an employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. By letter dated October 15, 2004, the Solicitor of Labor advised this office that, should it be found at trial that Claimant has a work-related permanent disability, the Director, Office of Workers' Compensation Programs would concede Employer's right to section 8(f) relief.

Section 8(f) relief is available if three requirements are met: (1) the claimant had a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer; and (3) such pre-existing disability, in combination with the subsequent work injury, contributes to a greater degree of permanent disability. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982). Claimant's medical records show that prior to his June 1999 low back injury, he reported back injuries on December 2, 1996, June 19, 1997, September 18, 1997, and in January 1998. EX 17 at 150-163. An October 1997 MRI of Claimant's spine was interpreted as revealing a disk bulge at L2-3. EX 17 at 157. In addition, as early as 1997, Claimant's medical records contain abnormal neurologic findings of hyperreflexia. EX 17 at 161. Therefore, Employer has met the first two requirements for section 8(f) relief by showing that Claimant had a permanent partial disability which existed prior to Claimant's work-related low back injury and which was manifest in medical records prior to his June 10, 1999 work injury. Employer has also met the third requirement for obtaining special fund relief by establishing that Claimant's ultimate disability is materially and substantially greater than the disability that would have resulted from the subsequent injury alone. 20 C.F.R. §702.321(a)(1). As described herein, Claimant's pre-existing hyperreflexia results in physical restrictions that are in addition to those necessitated by his subsequent back injury. For the reasons set forth above, and in light of the Director's concession, I find that Employer is entitled to section 8(f) relief.

5. Withdrawal of Claim for Medical Benefits

In his post-hearing brief, Claimant asks to withdraw his claim for out-of-pocket medical expenses in the amount of $551.00. A claim may be withdrawn prior to a determination of that claim provided that the administrative law judge approves the withdrawal as being for a proper purpose and in the claimant's best interest. *See* 20 C.F.R. § 702.255. Where a request for withdrawal of a claim is approved, such withdrawal shall be without prejudice to the filing of another claim, subject to the time limitation provisions of section 13 of the Act and of the regulations. *See* 20 C.F.R. § 702.255(c).

Prior to trial in this matter, Claimant chose to limit his claim for medical expenses to $551.00 in uninsured out-of-pocket expenses. He opted not to submit evidence of medical bills which were paid by his private health insurance provider for the reason that the insurer had not intervened as a third-party in the formal hearing process. Following trial, Claimant was informed that the insurer intends to pursue a third-party claim against Employer for medical expenses which it has paid on behalf of Claimant. Therefore, Claimant asks to withdraw his pending claim for medical benefits so that he may later present it along with the claim by his

insurer. He contends that this procedure will allow for full development of the record on the issue of liability for medical expenses. Employer opposes Claimant's request on the ground that the payments made by Claimant's insurer are related not to his low back injury, but to his hyperreflexia. Therefore, Employer argues that these medical costs cannot be assessed against it.

I find that Claimant has demonstrated that withdrawal of his claim for medical expenses is for a proper purpose and in his best interest. Because Claimant seeks to withdraw his relatively small claim in order to combine it with a larger, related claim by his insurer, this withdrawal is deemed to be for a proper purpose. Secondly, withdrawal is in Claimant's best interest because it will allow the parties to the later claim to fully develop the record on the medical expenses issue. Claimant is free to re-file his claim without concern for the Act's time limitations because a claim for medical benefits is never time-barred. *Colburn v. General Dynamics Corp*., 21 BRBS 219, 222 (1988). Moreover, I note that Employer will not be adversely affected or aggrieved unless or until a new claim is filed. Accordingly, Claimant's request to withdraw his claim for medical benefits is granted.

ORDER

It is hereby ORDERED that:

1. Employer shall pay Claimant compensation for temporary total disability for the periods between June 16, 1999 and July 13, 1999, and between July 21, 1999 and September 13, 2001, at a rate of $639.80 per week plus interest on accrued unpaid amounts due.

2. Employer shall pay Claimant compensation for permanent total disability for the period between September 14, 2001 and April 1, 2003, at a rate of $639.80 per week plus interest on accrued unpaid amounts due.

3. Beginning on April 2, 2003 and until ordered otherwise, Employer shall pay Claimant compensation for permanent partial disability at a rate of $604.27 per week plus interest on accrued unpaid amounts due.[7]

4. Employer is entitled to section 8(f) special fund relief, commencing 104 weeks after September 14, 2001.

5. Claimant's claim for medical expenses is the amount of $551.00 is withdrawn.

6. The District Director shall make all calculations necessary to carry out this order.

[7] This figure is 66 2/3 per centum of the difference between Claimant's average weekly wage of $959.71 and his adjusted post-injury wages of $53.30 per week, in accord with 33 U.S.C. §908(c)(21) and (h).

7. Claimant's counsel may file and serve a fee and cost petition in compliance with 20 C.F.R. §702.132 within twenty days after the filing of this Order. He shall thereupon discuss the petition with opposing counsel with a view of reaching an agreement on fees and costs. No later than fifteen days after the filing of the fee petition, Claimant's counsel shall file written notice of what, if any, agreements have been reached. Within fifteen days thereafter, Employer's counsel shall file detailed objections to any unresolved items. Claimant's counsel may reply to objections within fifteen days.

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ALEXANDER KARST
Administrative Law Judge

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